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Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, :
Plaintiff/Appellee, :
v. : Case No. 940091-CA
MOHAMED M. NOSSEIR, : Priority No. 2
Defendant/Appellant. :

BRIEF OF APPELLEE

- - - - -

APPEAL FROM A CONVICTION OF AGGRAVATED
ASSAULT, A THIRD DEGREE FELONY, IN VIOLATION
OF UTAH CODE ANN. § 76-5-103 (1990), AND
UNLAWFUL DETENTION, A CLASS B MISDEMEANOR, IN
VIOLATION OF UTAH CODE ANN. § 76-5-304
(1990), IN THE SEVENTH DISTRICT COURT, IN AND
FOR GRAND COUNTY, STATE OF UTAH, THE
HONORABLE BRUCE K. HALLIDAY, PRESIDING.

50

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Utah Court of Appeals

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Clerk of the Court

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BRIEF OF APPELLEE

- - - - -

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from a conviction of aggravated assault, a third degree felony, in violation of Utah Code Ann. § 76-5-103 (1990), and unlawful detention, a Class B misdemeanor, in violation of Utah Code Ann. § 76-5-304 (1990), in the Seventh District Court, in and for Grand County, State of Utah, the Honorable Bruce K. Halliday, presiding. This Court has jurisdiction to hear this appeal, pursuant to Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1994).

STATEMENT OF THE ISSUES AND

STANDARD OF REVIEW

The State concedes the trial court's denial of defendant's motion to withdraw his guilty plea was reversible error. Therefore, there is no disputed issue in this appeal.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Determinative constitutional provisions, statutes and rules are:

Utah Code Ann. § 77-13-6. Withdrawal of plea.

.

(2) (a) A plea of guilty or no contest may be withdrawn only upon good cause shown and with leave of the court.

(b) A request to withdraw a plea of guilty or no contest is made by motion and shall be made within 30 days after the entry of the plea.

.

Utah Rules of Criminal Procedure. Rule 11. Pleas.

.

(e) The court may refuse to accept a plea of guilty, no contest or guilty and mentally ill, and may not accept the plea until the court has found:

(1) if the defendant is not represented by counsel, he or she has knowingly waived the right to counsel and does not desire counsel;

(2) the plea is voluntarily made;
Criminal Procedure Rules, 11. Pleas

(3) the defendant knows of the right to the presumption of innocence, the right against compulsory self-incrimination, the right to a speedy public trial before an impartial jury, the right to confront and cross-examine in open court the prosecution witnesses, the right to compel the attendance of defense witnesses, and that by entering the plea, these rights are waived;

(4) the defendant understands the nature and elements of the offense to which the plea is entered, that upon trial the

prosecution would have the burden of proving each of those elements beyond a reasonable doubt, and that the plea is an admission of all those elements;

(5) the defendant knows the minimum and maximum sentence, and if applicable, the minimum mandatory nature of the minimum sentence, that may be imposed for each offense to which a plea is entered, including the possibility of the imposition of consecutive sentences;

(6) if the tendered plea is a result of a prior plea discussion and plea agreement, and if so, what agreement has been reached;

(7) the defendant has been advised of the time limits for filing any motion to withdraw the plea; and

(8) the defendant has been advised that the right of appeal is limited.

(f) Failure to advise the defendant of the time limits for filing any motion to withdraw a plea of guilty, no contest or guilty and mentally ill is not a ground for setting the plea aside, but may be the ground for extending the time to make a motion under Section 77-13-6.

STATEMENT OF THE CASE

Defendant was charged with aggravated sexual assault, a first degree felony, in violation of Utah Code Ann. § 76-5-405 (1990), and aggravated kidnapping, a first degree felony, in violation of Utah Code Ann. § 76-5-302 (1990) (R. 1-2).

On July 13, 1993, defendant plead guilty to aggravated assault, a third degree felony, in violation of Utah Code Ann. § 76-5-103 (1990), and unlawful detention, a Class B misdemeanor, in violation of Utah Code Ann. § 76-5-304 (1990) (See Statement of Defendant, "Statement," R. 4-10; Transcript of Plea Hearing of

July 13, 1993, "Transcript," T. 2-3, 7).¹ The transcript shows that the trial court neither engaged in a colloquy with defendant incorporating his pleas into the proceedings, nor informed him of the 30-day period in which to move to withdraw his pleas (T. 2-9). The Statement, also, does not indicate the period in which defendant may move to withdraw his pleas (R. 4-10).

On September 15, 1993, the trial court sentenced defendant to a term not to exceed five years in the Utah State Prison (R. 12-14).

On January 13, 1994, six months after the entry of his pleas, defendant moved to withdraw his guilty pleas. The motion, in its entirety, stated:

Comes Now the plaintiff [sic], Mr. Mohamed M. Nosseir, attorney [sic] pro se, acting without the assistance of counsel, and moves the honorable court by this motion: "Withdraw Involuntary & Unknowing Guilty Plea, pursuant [sic] {77-13-6 Utah Code Annotated}, and case in point: "Panuccio v Kelly [sic], 927 F.2d 106, 108-09 (2d Cir. 1991)".

(See Motion to Withdraw Involuntary & Unknowing Guilty Plea & Pursuant {77-13-6 U.C.A. 1953}, hereinafter "Motion," R. 15-16). The trial court, apparently without a hearing, denied defendant's motion on January 26, 1994 (See Order Denying Motion, R. 20-21).

¹ All documents referred to in this brief are included in defendant's addenda.

STATEMENT OF FACTS

All facts necessary to this Court's disposition of this matter are set out in the statement of the case.²

SUMMARY OF ARGUMENT

The State concedes reversible error in the trial court's denial of defendant's motion to withdraw his guilty pleas. In accepting defendant's pleas, the trial court failed to follow the procedure required by rule 11(e), Utah Rules of Criminal Procedure. The trial court also failed to conduct any colloquy with defendant incorporating defendant's plea statement into the record. Therefore, the pleas were accepted in violation of State v. Gibbons, 740 P.2d 1309 (Utah 1987), which requires strict compliance with rule 11(e).

The trial court also failed to inform defendant of the time limits for filing any motion to withdraw his pleas, as required by rule 11(e). Also, defendant's statement did not refer to any such time limits. Therefore, defendant's filing his motion to withdraw in excess of the statutory period cannot be considered untimely.

While defendant's motion may have insufficiently alerted the trial court to its error in accepting defendant's pleas, the trial court should have independently recognized its

² The State's statement of the case is substantially the same as defendant's. See Appellant's Statement of the Case at 3-5. However, defendant's Statement of the Facts and Addendum include a discussion and a lengthy letter from the victim to the Board of Parole and Pardons which are not part of the record and should be stricken.

error in failing to comply with rule 11(e). Therefore, because the error should have been obvious and was harmful, it was plain error to deny defendant's motion to withdraw his guilty pleas.

ARGUMENT

BECAUSE DEFENDANT'S GUILTY PLEAS WERE ACCEPTED IN VIOLATION OF RULE 11, UTAH RULES OF CRIMINAL PROCEDURE, THE TRIAL COURT'S DENIAL OF DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEAS WAS PLAIN ERROR

The State concedes reversible error in the trial court's denial of defendant's motion to withdraw his guilty pleas.

A. The Trial Court Did Not Strictly Comply with Rule 11(e) in Accepting Defendant's Guilty Pleas.

Rule 11(e), Utah Rules of Criminal Procedure, requires that the trial court make certain determinations and provide certain information to a defendant before accepting the defendant's pleas. In State v. Gibbons, 740 P.2d 1309 (Utah 1987), the supreme court imposed on trial courts the duty of "ensuring that constitutional and Rule 11(e) requirements are complied with when a guilty plea is entered." Id. A plea affidavit may be used in aid of rule 11 compliance, but it must be addressed during the plea hearing. State v. Maguire, 830 P.2d 216, 217 (Utah 1991) (citing State v. Smith, 812 P.2d 470, 477 (Utah App. 1991), cert. denied, 836 P.2d 1383 (Utah 1992)). In short, the trial court must strictly comply with the requirements of rule 11(e) in accepting a plea. Maguire, 830 P.2d at 217.

In accepting defendant's pleas, the trial court in this case failed to follow any of the specific requirements of rule 11(e). The trial court also failed to incorporate defendant's statement into the record through any colloquy with defendant. Therefore, the pleas were taken in violation of Gibbons.

B. Defendant's Motion to Withdraw
His Guilty Pleas Was Not Untimely
Under the Circumstances of This Case.

Rule 11(e) also requires that "the defendant [be] advised of the time limits for filing any motion to withdraw the plea." Utah R. Crim. P. 11(e)(7). Rule 11(f) provides that "[f]ailure to advise the defendant of the time limits for filing any motion to withdraw a plea of guilty . . . is not a ground for setting the plea aside, but may be the ground for extending the time to make a motion under Section 77-13-6." Utah R. Crim. P. 11(f). Utah Code Ann. § 77-13-6(2)(b) (1990) provides that the motion to withdraw "shall be made within 30 days after the entry of the plea.

No Utah case has held that the time for filing the motion to withdraw is automatically extended by the trial court's failure to inform the defendant of the statutory time limits. However, the tenor of opinions discussing the timeliness of filing in related circumstances strongly suggests that Utah appellate courts will not invoke the mandatory language of section 77-13-6(2)(b) to deprive an uninformed defendant of his opportunity to withdraw his plea. Cf. Gibbons, 740 P.2d at 1311 (allowing withdrawal of a guilty plea, even though a motion had

not been filed, in part because then-current section 77-13-6 set no time limit for filing the motion to withdraw the plea); Smith, 812 P.2d at 475-76 (stating, in dicta, that rule 11 allows the trial court to consider untimely motions to withdraw if provision of rule 11(f) requiring the trial court to advise the defendant of the time limits is not met); State v. Price, 837 P.2d 578, (Utah App. 1992) (stating, in dicta, that there is an exception in Rule 11 [to section 77-13-6(2)(b)'s filing deadline] which allows that deadline to be extended if a defendant has not been informed of the thirty-day time period).

In this case the trial court failed to inform defendant of the time limits stated in section 77-13-6(2)(b) for filing a motion to withdraw his pleas, as required by rule 11(e)(7). Also, defendant's statement did not refer to any such time limits. Therefore, defendant's filing his motion to withdraw in excess of the statutory period should not be considered untimely.

C. Because the Trial Court Failed to Meet the Requirements of Rule 11, Denial of Defendant's Motion to Withdraw his Pleas was Plain Error.

Defendant argues that his pro se motion sufficiently informed the trial court of the reasons for moving to withdraw his guilty pleas. Appellant's Br. at 14-15. Defendant's motion alleged only that his pleas were "involuntary and unknowing," and that a case, Pannucio v. Kelly, 927 F.2d 106 (2nd Cir. 1991), was on point (R. 15).

Arguably, defendant's contention is without merit. The obvious object of the plea hearing is to ensure that the

defendant enters his plea knowingly and voluntarily. A defendant who claims that his plea was accepted "unknowingly and involuntarily" fails, by the breadth of his terminology, to focus the trial court on a particular claim of error. Similarly, the citation to a federal case which holds that the district court adequately inquired into whether the defendant voluntarily and intelligently waived his right to a trial does not clearly focus the trial court on the claimed error in this case. Thus, defendant arguably waived his claim by only nominally stating its basis. See State v. Johnson, 771 P.2d 326, 327-28 (Utah App. 1989) (holding that "nominally alluding" to article I, section 14 of the Utah Constitution as an independent ground for protection from unreasonable searches and seizures, "without any analysis before the trial court does not sufficiently raise the issue to permit consideration by this court on appeal"), rev'd on other grounds, State v. Johnson, 805 P.2d 761 (Utah 1991).

However, notwithstanding defendant's likely waiver, the State concedes the trial court's disregard of rule 11(e) was so obvious that it should have triggered an independent recollection of the plea taking in the trial court's mind.

In State v. Dunn, 850 P.2d 1201 (Utah 1993), the supreme court identified the necessary showing to establish plain error:

In general, to establish the existence of plain error and to obtain appellate relief from an alleged error that was not properly objected to, the appellant must show the following: (i) An error exists; (ii) the error should have been obvious to the trial

court; and (iii) the error is harmful, i.e., absent the error, there is a reasonable likelihood of a more favorable outcome for the appellant, or phrased differently, our confidence in the verdict is undermined. See State v. Verde, 770 P.2d 116, 122 (Utah 1989); State v. Bell, 770 P.2d 100, 105-06 (Utah 1988); State v. Knight, 734 P.2d 913, 919-20 (Utah 1987); State v. Fontana, 680 P.2d 1042, 1048 (Utah 1984); see also [State v.] Eldredge, 773 P.2d [29], 35-36 [(Utah 1989)]; cf. Utah R. Evid. 103(d); Utah R. Crim. P. 19(c). If any one of these requirements is not met, plain error is not established. Cf. State v. Hamilton, 827 P.2d 232, 240 (Utah 1992); [State v.] Verde, 770 P.2d at 123.

Id. at 1208-09.

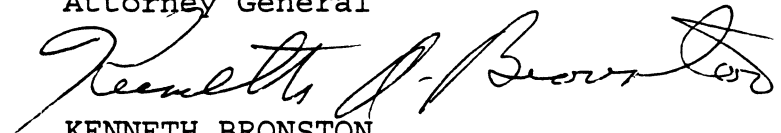
Because the trial court's error in failing to conduct the plea hearing in accordance with rule 11 should have been obvious, and because the error is harmful as a matter of law, defendant should be allowed to withdraw his guilty pleas.

CONCLUSION

The State concedes reversible error in the trial court's acceptance of defendant's guilty pleas.

RESPECTFULLY SUBMITTED this 1st day of September, 1994.

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CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing Brief of Appellee was mailed, postage prepaid, to Craig S. Cook, attorney for appellant, 3645 East 3100 South, Salt Lake City, Utah 84109, this 1st day of September, 1994.

Kenneth A. Brundage